

UNITED STATES
v.
BEN HANSON

IBLA 76-506

Decided August 27, 1976

Appeal from decision of Administrative Law Judge Robert W. Mesch holding the Nellie Gray lode mining claim null and void.

Affirmed; petition for new hearing denied.

1. Mining Claims: Discovery

A lode mining claim is properly declared null and void in the absence of a showing of a discovery on the claim of a lode or vein bearing mineral which would warrant a prudent man to further expend his labor and means in the reasonable expectation of developing a valuable mine.

2. Mining Claims: Discovery

Evidence of mineralization which may justify further exploration, but not development of actual mining operations, is not sufficient to establish that a discovery of a valuable mineral deposit has been made.

3. Mining Claims: Hearings -- Rules of Practice: Hearings

A petition to reopen a hearing for the submission of further evidence will be denied when the contestee offers no valid justification for the neglect to offer the evidence, which was or could have been available at the original hearing.

APPEARANCES: Richard K. Aldrich, Esq., Office of the Solicitor, Billings, Montana, for Contestant; Jon E. Ellingson, Esq., Missoula, Montana, for Contestee.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Ben Hanson has appealed from a decision by Administrative Law Judge Robert L. Mesch dated January 30, 1976, holding the Nellie Gray lode mining claim, located in Section 23, T. 34 N., R. 29 W., P.M., Montana, null and void.

Hanson located the claim on October 31, 1965, on land which had been the subject of mining activity since about 1900. The Administrative Law Judge reviewed the facts and the law. He concluded that the evidence did not demonstrate the existence of a valuable mineral deposit within the limits of the claim, that a valuable mineral deposit required the showing of mineralization of such quality and quantity as would warrant a prudent man in the further expenditure of labor and means in the reasonable expectation of developing a valuable mine, and that mineralization which at most only warrants further prospecting or exploration in an effort to ascertain whether there is a discovery is not enough. He also pointed out that the land had been withdrawn on December 13, 1965, from appropriation under the mining laws by the notation on the land office records of a Corps of Engineers' request for withdrawal, and by P.L.O. 4484 of 33 F.R. 10397 (1968). He held the claim invalid because it was not perfected by the discovery of a valuable mineral deposit prior to the segregative date of the withdrawal of the land from the operation of the mining laws on December 13, 1965, or at the time of the decision.

He then denied contestee's request for additional time to do more exploration work to prove or disprove the existence of a valuable deposit, pointing out that a claim invalid on the effective date of a withdrawal cannot be perfected by a later discovery.

[1, 2] We have reviewed the record and find that the evidence and law have been stated and fully considered by the Administrative Law Judge. We agree with his conclusion and adopt his decision as part of this decision as Appendix A.

We find nothing in the contestee's Statement of Reasons for Appeal to warrant any further discussion of the holding that at most the evidence as to mineralization on the claim warranted only further exploration. As the Administrative Law Judge held, and as this Board has often held, a degree of mineralization which may only warrant further exploration and not development is not sufficient to find that a discovery of a valuable mineral deposit has been made on a mining claim. United States v. Fichtner, 24 IBLA 128 (1976); United States v. Tappan, 25 IBLA 1 (1976).

The contestee has also filed a Petition for Rehearing. First he urges that the record supports his claim that a discovery exists on the claim. We have disposed of that point in our prior discussion.

Next he asks for a rehearing to prove the existence of a discovery. He says that from 1965 to 1969 there was no urgency to do extensive exploration, and that after 1969 he was involved in litigation with a claim jumper. When he had met that challenge, the Corps of Engineers constructed a road across the west end of his claim where a creek emptied into a lake, causing a pond to form and flood part of the claim. He alleges that he was thereby hindered in establishing a discovery on the claim. In support of his request he cites United States v. Forsyth, 15 IBLA 43 (1974). There contestee, who had been legally restrained by the United States from conducting operations on his claim, was permitted after the land in the claim had been withdrawn from appropriation under the mining laws, to sample the exposed deposits to establish, if he could, that a valuable mineral deposit existed in the claim as of the effective date of the withdrawal.

The Forsyth case is not at all analogous. The contestee here had many years to sample the exposed mineralization on the claim. The United States did not legally restrain him in any way. The claim was completely open throughout the year to sampling or other work prior to the first flooding in 1970 and even thereafter for part of the year. It was at all times open to work on the area above the water level. We note that on June 14, 1974, contestee's former attorney requested a delay in the hearing so that sampling could be carried out. Despite the postponement of the hearing for some time, contestee presented no new samples at the hearing. The contestee did not ask the BLM mineral examiners to sample any underground areas, although the lower adit was open and they took one sample underground in this adit (Tr. 28; Contestee's Exh. 4).

The contestee had ample time and opportunity fully to explore and sample the claim. We find no justification for reopening the hearing to permit further sampling.

We have considered the items contestee says he would offer as new evidence. The Anaconda assay report he refers to was offered as Contestee's Exhibit No. 2 and was considered. At best it was a picked sample "composed of material the contestee picked up here and there" (Tr. 132), and is of little evidential value.

As to his new core samples which he says he has, but which he has not submitted, there is no reason why contestee could not have taken them prior to the hearing. The testimony of a mining engineer whom appellant proposes to call, was available and the contestee offers no explanation for the failure to call him in addition to the expert he did offer.

Again, no reason is given why Hanson could not have expanded on his own testimony at the hearing. Finally, the contention that the contestant's photographic evidence was inaccurate, for which statement no proof is offered, could and should have been offered at the hearing. Accordingly, we find no justification to reopen the hearing in this case and contestee's petition is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge holding the claim null and void is affirmed.

Martin Ritvo
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Joan B. Thompson
Administrative Judge

January 30, 1976

UNITED STATES OF AMERICA,	:	MONTANA 26076
	:	
Contestant	:	Involving the Mineral
	:	Location of the Nellie
v.	:	Gray Lode Mining Claim
	:	situated in Section 23,
BEN HANSON, :	:	T. 34 N., R. 29 W.,
	:	Principal Meridian,
Contestee	:	Lincoln County, Montana

DECISION

Appearances: Richard K. Aldrich, Esq., Office of the Solicitor, Department of the Interior, Billings, Montana, for contestant;

Lawrence G. Stimatz, Esq., Stimatz & Engel, Butte, Montana, for contestee.

Before: Administrative Law Judge Mesch.

Pursuant to 43 CFR 4.451, the Montana State Office, Bureau of Land Management, issued a complaint charging, among other things, that the subject mining claim is invalid because "[v]aluable minerals have not been found within the limits of the claim so as to constitute a discovery as required by the mining laws." The complaint requests that the mining claim be declared null and void.

The proceeding was initiated at the request of the Corps of Engineers, Department of the Army. The contest arises as a result of an action instituted in the Court of Claims by the contestee. The contestee apparently contends in that action that the Corps of Engineers interfered with his property, the mining claim, when it performed certain construction work that resulted in the flooding of a portion of the claim for a substantial part of each year.

A hearing was held on August 5, 1975, at Missoula, Montana. Both the contestant and the contestee appeared and presented evidence relating to the validity of the mining claim. Post-hearing briefs and proposed findings and conclusions have been submitted by the parties. The final brief was filed on January 12, 1976.

The land included within the contested mining claim has been the subject of prospecting activities since at least the early 1900's. Various parties held the land under mining locations prior to October 31, 1965, when the contestee located the Nellie Gray claim.

By Public Land Order 4484 the land within the mining claim was withdrawn from appropriation under the mining laws for the protection of facilities of the Libby Dam Project. The withdrawal order was published in the Federal Register on July 20, 1968. The application for the withdrawal was filed December 13, 1965, less than two months after the contested claim was located. The lands were effectively withdrawn from the operation of the mining laws when the receipt of the application was noted on the records of the Bureau of Land Management. See Mrs. Ethel H. Meyers, 65 I.D. 207 (1958); Marion Q. Kaiser et al., 65 I.D. 485 (1958); United States v. Harlan H. Foresyth, 15 IBLA 43 (1974).

The Department of the Interior and the Courts have consistently held:

1. that a mining claim cannot be recognized as valid unless a valuable mineral deposit has been found or discovered within the limits of the claim;
2. that a valuable mineral deposit is an occurrence of mineralization of such quality and quantity as to warrant a person of ordinary prudence in the expenditure of time and money in the development of a mine and the extraction of the mineral, i.e., the mineral deposit that has been found must have a present value for mining purposes;
3. that mineralization that only warrants further prospecting or exploration in an effort to ascertain

whether sufficient mineralization might be found to justify mining or development does not constitute a valuable mineral deposit;

4. that where land is withdrawn from the operation of the mining laws subsequent to the location of a mining claim, the claim cannot be considered valid unless it was perfected by the discovery of a valuable mineral deposit at the time of the withdrawal; and

5. that, in any event, a mining claim is not valid unless it is supported by a discovery of a valuable mineral deposit at the time of the hearing.

See, for example, Chrisman v. Miller, 197 U.S. 313 (1905); Cameron v. United States, 252 U.S. 450 (1920); United States v. Coleman, 390 U.S. 599 (1968); Mulkern v. Hammitt, 326 F.2d 896 (9th Cir. 1964); Henault Mining Company v. Tysk, 419 F.2d 766 (9th Cir. 1969); Barton v. Morton, 498 F.2d 288 (9th Cir. 1974); United States v. C. F. Snyder et al., 72 I.D. 223 (1965), aff'd., 405 F.2d 1179 (10th Cir. 1968); United States v. Frank W. Winegar et al., 16 IBLA 112, 81 I.D. 370 (1974); United States v. James P. Rigg, Jr., et al., 16 IBLA 385 (1974).

The recent decision in Barton v. Morton, *supra*, is particularly significant insofar as this proceeding is concerned. In that case, veins had been exposed containing some gold and silver. The mineralization was spotty and uneven. The mineralization was not of sufficient quantity to be mined economically. Expert witness testified that a prudent man would be justified in tunneling into or along the veins in search of chutes or pockets containing sufficient ore to be profitably mined. The Court quoted with approval:

[i]t is not where suggested that any quantity of material of the quality of the vein matter thus far disclosed would constitute a mineable body of ore. The evidence does not, in fact, establish any mineral quality of any consistent extent. Although appellants

have found ore samples with indicated values exceeding \$ 70 per ton, the record does not support a finding that they have found a deposit yielding ore of that quality, or of any other quality, the exploitation of which may be contemplated.

* * *

. . . That which is called for . . . is further exploration to find the deposit supposed to exist (p. 291)

The evidence presented by both the contestant and the contestee establishes beyond any question that the Nellie Gray mining claim was not perfected by the discovery of a valuable mineral deposit at the time the lands were withdrawn from the operation of the mining laws and that the claim is not presently supported by the discovery of a valuable mineral deposit. At best, the evidence simply shows that there is mineralization on the claim that might warrant the expenditure of time and money in prospecting or exploration in an attempt to find a valuable mineral deposit within the limits of the claim.

The contestee, through two different attorneys, recognizes these evidentiary conclusions. In closing arguments at the hearing, the attorney who was then representing the contestee stated:

. . . The testimony before the Court by both the Government and Mr. Hanson is that maybe there is not enough there to develop, maybe there isn't enough to run a mucking machine in there and load it on a truck, but there is mineralization on the ground. There are some values there.

It would appear that there is certainly ground that warrants further exploration. Both experts for the Government stated that and so did our expert. They both feel there is grounds for exploration. (Tr. 194)

In a post hearing brief, the attorney who is now representing the contestee states:

. . . [Ben Hanson] asks the Court to grant him additional time to do exploration work which will prove or disprove the existence of a valuable mineral deposit. (p. 1)

* * *

. . . Neither Mr. Hanson nor all of the mining engineers or geologists who have examined the claim have disagreed on the fact that the Nellie Gray is a good prospect and justifies further expenditure of money in exploration. Mr. Hanson needs time to conduct further exploration. . . . (pp. 2 and 3)

* * *

As a result of this hearing it is asked that the Court rule in favor of Contestee in granting an extension of time, based on the flood conditions and the reasonable time required to explore below the surface of the lower adit, to permit Contestee to determine or produce an ore body of sufficient value to support a valid discovery, on the grounds that the Contestee has been prevented by various actions of the Government from doing this before. The Government will suffer no harm by this ruling, and there is precedent as above quoted for permitting such exploration. . . . (p. 4)

I have no alternative under the law and the evidence other than to conclude that the Nellie Gray mining claim is invalid because it has not been perfected by the discovery of a valuable mineral deposit as required by the mining laws.

The contestee argues that he should be given "additional time to do exploration work which will prove or disprove

the existence of a valuable mineral deposit." I have no authority to permit a mining claimant to hold a mining claim that is invalid. Even if I could grant the contestee's request, it would serve no purpose because the lands are withdrawn from the operation of the mining laws and the contestee cannot now perfect his claim by making a discovery of a valuable mineral deposit. See United States v. Ruth Arcand et al., 23 IBLA 226 (1976).

In United States v. Frank Coston, A-30835 (February 23, 1968), the Department stated:

. . . no rights against the Government are established under a mining claim except upon the discovery of a valuable mineral deposit within the limits of the claim, and, when the Government withdraws its consent to mining location, either by withdrawing the land from the operation of the mining laws or by otherwise making it unavailable for mining operations, the mining claimant must show that he made a discovery of a valuable mineral deposit prior to such withdrawal of consent in order to retain his possession. . . .

* * *

. . . Since a mining claimant acquires no rights against the United States prior to making a discovery, he cannot be heard to complain if the United States removes the land from further operation of the mining laws before he makes a discovery. What appellant is arguing, in effect, is that although a mining claimant has made no discovery prior to removal of the land from operation of the mining laws and consequently has no rights as against the United States, he nonetheless has the right to continue to endeavor to make a discovery and thus acquire rights as against the United States. This leads to the absurd result that once a paper location has been made on land, the United States is powerless to devote the land to some other use because the locator has a right to continue efforts to make a discovery and thus acquire rights to the land as against

the United States. To state the proposition is to reject it, and there is absolutely no authority for it. (pp. 6 and 7)

The contestee relies on Henault Mining Company v. Tysk, supra, and Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), in support of the assertion that he should be given additional time to conduct exploration work. The cases are not applicable insofar as this point is concerned. Both cases involved proceedings under the Multiple Surface Uses Act of 1955, 30 U.S.C. §§ 612-613 to determine the right of the Government to manage the surface resources of the mining claims. No agency of the Government was seeking a determination that the mining claims were null and void and that the mining claimants had no right or interest in the lands. In addition, the lands in those two cases had not been withdrawn from the operation of the mining laws.

I have considered the proposed findings and conclusions submitted by the parties and, except to the extent that they have been affirmed in this decision, they are rejected on the grounds that they are not relevant or are contrary to the law.

Pursuant to the prayer of the complaint, the Nellie Gray Lode Mining Claim is declared null and void because it was not perfected by the discovery of a valuable mineral deposit prior to the withdrawal of the land from the operation of the mining laws and it is not presently supported by a discovery of a valuable mineral deposit.

Robert W. Mesch
Administrative Law Judge

APPEAL INFORMATION

The contestee, as the party adversely affected by this decision, has the right of appeal to the Interior Board of Land Appeals. The appeal must be in strict compliance with the regulations in 43 CFR Part 4. (See enclosed information pertaining to appeals procedures.)

If an appeal is taken the adverse party, the Bureau of Land Management, can be served by service upon the Office of the Field Solicitor, at the address listed below.

Enclosure: Information Pertaining to Appeals Procedures

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Editor's note: There is no page 312 in volume 26.

